BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MIKE D. MEHL	)	
Claimant	)	
	)	
VS.	)	
	)	
CENTRAL DETROIT DIESEL	)	
Respondent	)	Docket No. 1,032,002
	)	
AND	)	
	)	
UNIVERSAL UNDERWRITERS	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the February 12, 2007 Order For Medical Treatment entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

The Administrative Law Judge (ALJ) specifically concluded the claimant met with personal injury by accident arising out of and in the course of his employment with the respondent and that timely notice was given. Thus, respondent was ordered to pay for the claimant's medical treatment until he reaches maximum medical improvement or returns to employment.

The respondent appeals alleging the claimant failed to meet his burden of establishing personal injury by accident out of and in the course of his employment. Respondent also denies claimant provided timely notice of his injury as required by K.S.A. 44-520. Accordingly, respondent requests the Board reverse the ALJ's decision.

Claimant argues that the Board should affirm the ALJ's decision in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant is a diesel mechanic who, on October 17, 2006, says he was injured when he bumped an engine head, dislodging it and causing him injury to his left shoulder and the top part of his back. Claimant continued to work the balance of the workday and in fact the week, but says his left shoulder and back were sore and stiff. Claimant testified that he told Joe White that day that his shoulder hurt as a result of bumping this head.

The following week, claimant was sent to training in Topeka, Kansas. By that Monday, claimant's neck had stiffened up. Claimant told the classroom supervisor that his shoulder hurt, but claimant continued to perform all the classroom activities and other duties he was required to perform at this training activity.

When claimant returned to work on Monday October 30, 2006, he found himself "overly stiff" and having a hard time moving his shoulder.[1] Claimant contacted his employer and advised that he was going to the doctor. Claimant testified that he told Jim Brown, the plant manager, that day that he had sustained a work-related injury.[2] Claimant further testified that Mr. Brown told him, some days later, that he would not fill out any workers compensation form as claimant waited too long to report his injury.

Claimant first sought treatment from a chiropractor, Dr. Shane Franz, on October 30, 2006. Claimant testified the chiropractor contacted his employer directly and had a conversation with Jim Brown about claimant's inability to work. Dr. Franz performed some adjustments to claimant's shoulder, but avoided the neck area. He also took some x-rays. Claimant continued to call in each day stating he was unable to work and went to the chiropractor for adjustments.

Eventually Dr. Franz referred claimant to his primary physician for further evaluation of the neck and shoulder complaints. This apparently occurred on either November 6 or 7, 2006.

Ron Vrbas witnessed the head falling on October 17, 2006, he denies claimant mentioned any injury, nor did he have any further conversation with claimant about the event.

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[1] Claimant's Depo. at 16.

[2] *Id.* at 23.

Joe White and Jason Cook, the two shift foremen who *should have* received notice of any work-related injury, both testified that neither of them recall any injury being reported to them during this period of time.

Jim Brown testified that he first became aware of claimant's alleged work-related injury on November 7, 2006 when claimant called him about an MRI. Although, Mr. Brown conceded that he talked to claimant on October 30, 2006 and that claimant told him during that call that he was injured. Mr. Brown jokingly responded that claimant would no longer be sent to any training events if he came back unable to work. Thereafter, Mr. Brown says claimant called in each day and reported that he was unable to work. Then, on November 7, 2006 Mr. Brown says claimant called and asked to fill out workers compensation paperwork as his injury occurred while working on October 27, 2006. Mr. Brown confirms that he was unwilling to fill out the paperwork and recommended claimant file his bills with the insurance company.

The ALJ granted claimant's request for medical treatment specifically finding that claimant established a compensable injury and that he gave timely notice. She did not, however, make a finding as to the date of claimant's accident.

This Board Member has no difficulty affirming the ALJ's conclusion that claimant established that he suffered an accidental injury arising out of and in the course of his employment with respondent. Upon close examination of the record, no one contradicts claimant's recitation of his accident. Ron Vrbas corroborated the event although he says he was not aware claimant was hurt as a result. Even claimant says that he didn't realize that he was seriously hurt. He thought his physical complaints would subside. Thus, this portion of the ALJ's Order is affirmed.

The remaining issue, whether claimant provided timely notice is more complicated. Unfortunately neither the ALJ, nor the parties addressed a rather recent change in the law which alters the date of accident analysis. And more importantly, the ALJ failed to make any specific finding as to the date of claimant's accident.

Before a determination can be made on the timeliness of claimant's notice, it must first be determined what claimant's date of accident is for purposes of this claim. This is an alleged repetitive trauma injury. The date of accident in this case is not necessarily the last day worked as has, up to this point, been determined by a long line of cases.[3]

K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma

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[3] *Kimbrough v. University of Kansas Med. Center*, 276 Kan. 853, 79 P.3d 1289 (2003); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999); *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

In this instance, claimant alleges he sustained a series of repetitive injuries over a two week period ending October 27, 2006. He was taken off work on October 30, 2006 by his own chiropractor, not an authorized physician. Thus, if this is indeed found to be an accident that occurred over a series of dates, October 30, 2006 is *not* the appropriate date of accident for purposes of determining timely notice. The analysis must be to consider if there was a series of accidents and if so, which of the earlier alternative dates apply.

Under this statute, the next operative date is the date upon which written notice is given. It is unclear from this record when written notice was given to respondent, other than the Application for Hearing which was filed with the Division on November 21, 2006. Although claimant knew, from the outset, that he was hurt at work he did not receive any written notification from a physician advising him of his diagnosis and its connection to work. Failing those two alternatives, the ALJ is empowered to weigh the facts and determine the appropriate date of accident.

Here, the ALJ concluded claimant provided timely notice. However, without a determination of the actual date of accident, it is difficult for this Board Member to determine whether the ALJ's conclusion with respect to the timeliness of claimant's notice was erroneous. It is wholly unknown whether the ALJ concluded claimant suffered a single traumatic accident or a series of accidents. Moreover, neither of the parties have addressed this change in the law and provided their respective positions on the issue of

claimant's date of accident. For this reason, this Board Member finds that this aspect of the Order must be reversed and remanded for further proceedings solely on the issue of claimant's date of accident including whether claimant suffered injury of a single accident date of a series of accidents.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[4] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated February 12, 2007, is affirmed in part and reversed and remanded in part, consistent with the findings set forth above.

IT IS SO ORDERED.

Dated this _____ day of May, 2007.

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BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
Kurt W. Ratzlaff, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge

[4] K.S.A. 44-534a.